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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 368

AMERICAN MOTOR SPECIALTIES CO., INC., ET AL.,
Petitioners,

against

FEDERAL TRADE COMMISSION, *Respondent.*

MOTION OF MID-SOUTH DISTRIBUTORS, ET AL., TO DEFER CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Mid-South Distributors, Cotton States, Inc., and others, petitioners in Docket No. 17,860, now pending decision before the United States Court of Appeals for the Fifth Circuit, a proceeding to review and set aside an order of the Federal Trade Commission, respectfully move this Court to defer consideration of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in the above-

captioned matter, filed August 30, 1960. In support of this motion, movants show:

1. The instant proceeding against American Motor Specialties Co., Inc., and others, and the proceeding against movants originated by complaint of the Federal Trade Commission in 1949 and 1950, respectively. While other questions not raised in the *American Motor Specialties* case are raised in *Mid-South*, both cases were decided by the Commission in 1959, and now raise for the first time the question whether the Federal Trade Commission has met the required standard of proof of knowledge of cost justification under Subsection 2(f) of the Robinson-Patman Act as set forth by this Court in its decision in *Automatic Canteen Co. of America* v. *Federal Trade Commission*, 346 U.S. 61. Prior to these cases, and since this Court's decision in *Automatic Canteen*, no proceeding under Subsection 2(f) has reached the Courts for decision on its merits.

2. On January 24, 1959, the Federal Trade Commission rendered its decision in the *Mid-South Distributors* case (sub nom. *In the Matter of D & N Auto Parts Co., Inc., et al.*, CCH Trade Reg. Rep., ¶27,846), holding that the charged buyers knowingly received a price discrimination in violation of Subsection 2(f). On March 12, 1959, relying upon its *D & N Auto Parts* ruling, the Commission entered its decision in the instant case, holding that the charged buyers there had knowingly received an unlawful price discrimination in violation of Subsection 2(f).

3. On July 3, 1959, petition to review and set aside the order of the Federal Trade Commission was filed in the United States Court of Appeals for the Fifth Circuit on behalf of Mid-South Distributors, et al. On

October 10, 1960, oral argument was held in the United States Court of Appeals for the Fifth Circuit in the *Mid-South Distributors* case. The matter is now submitted for final decision to the Court.

4. On May 5, 1960, the decision of the Court of Appeals for the Second Circuit was handed down, affirming the Commission's order in the *American Motor Specialties* case. Thereafter, on August 30, 1960, the instant petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was filed in this Court.

5. While substantial issues are raised in the *Mid-South Distributors* case in the Fifth Circuit Court of Appeals which were not raised in the *American Motor Specialties* case in the Second Circuit, both cases present the important question of whether the Federal Trade Commission properly applied the standard of proof of knowledge of lack of cost justification required by this Court in *Automatic Canteen*. This question has not heretofore been decided by this Court. Both cases also involve questions as to the construction of the exemption for cooperative associations provided in Section 4 of the Robinson-Patman Act, not heretofore passed upon by this Court. Since the forthcoming decision of the Fifth Circuit should deal with these two questions of law, we believe that decision, if before this Court at the time it considers the instant petition, will afford the Court a fuller opportunity to assess the nature and importance of these questions for review.

WHEREFORE, in view of the parallel nature of these two proceedings in these several important respects, Mid-South Distributors, and others, petitioners in No.

17,860 in the United States Court of Appeals for the Fifth Circuit, ask that this Court defer consideration of the petition for a writ of certiorari in the instant proceeding until decision in the *Mid-South Distributors* case has been handed down by the Fifth Circuit Court of Appeals.

Respectfully submitted,

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